149 US 273

RECORD, CASE NO. 13844.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO. 234.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

MOSES MOCK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED OCTOBER 21, 1889.

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1 In the circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MOSES MOCK, DEFENDANT.

Complaint.

Now comes the above named plaintiff by its attorney, S. G. Hilborn, esq., and complains of the above named defendant and for cause of action alleges:

That on the first day of May, A. D. 1873, the plaintiff was, and for a long time prior thereto had been, and ever since has been, and still is, the owner and seized in fee, and entitled to the possession of all those certain tracts or parcels of land lying and being situate in the county of Fresno, State of California, and particularly described as follows: Being the south half of the northeast quarter, west half of the southeast quarter, and the east half of the southwest quarter, section nine, township ten south, range twenty-four east, Mount Diablo meridian, together with all the trees growing and being thereon, and all the appurtenances belonging to said land.

That the defendant, on the first day of May, A. D. 1873, and at divers times between that day and the thirty-first day of December, A. D. 1874, while the plaintiff was owner in fee and seized of said land and the timber and trees growing and being thereon, wrongfully and unlawfully and without the consent of plaintiff, cut and caused to be cut the following timber, then and there being and growing upon the said above described land, the same being then and there the property of the United States, that is to say, one thousand pine trees, and he, the said defendant, then and there manufactured the same into lumber, and the said one thousand pine trees produced three million feet of lumber.

And plaintiff further alleges that said lumber was ofthe value of thirty thousand ($30,000) dollars.

And plaintiff further alleges that the said defendant wrongfully and unlawfully, and without the consent of plaintiff, took said lumber
2 heretofore described from the possession of the said plaintiff, and still unlawfully withholds and detains said goods and chattels from the possession of the plaintiff to the plaintiff's damage in the sum of thirty thousand dollars.

Wherefore the plaintiff demands judgment against the said defendant for the said sum of thirty thousand dollars, the value of the said goods and chattels, with two thousand dollars damages and costs of suit.

S. G. HILBORN,
United States Attorney.

(Endorsed:) Filed July 23, 1884. L. S. B. Sawyer, clerk. By F. D. Monckton, deputy clerk.

United States of America, circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MOSES MOCK, DEFENDANT.

Action brought in the said circuit court, and the complaint filed in the office of the clerk of said circuit court, in the city and county of San Francisco.

Summons.

The President of the United States of America, greeting:

To Moses Mock: You are hereby required to appear in an action brought against you by the above named plaintiff, in the circuit court of the United States, ninth circuit, in and for the district of California, and to file your plea, answer, or demurrer to the complaint filed herein (a certified copy of which accompanies this summons), in the office of the clerk of said court, in the city and county of San Francisco, within ten days after the service on you of this summons, if served in this county; or if
3 served out of this county, then within thirty days, or judgment by default will be taken against you.

The said action is brought to obtain a judgment against you for the sum of thirty thousand dollars alleged to be due said plaintiff, being the value of three million feet of lumber manufactured from pine trees, the goods and chattels of said plaintiff, and wrongfully and unlawfully taken and withheld from the possession of said plaintiff by said defendant, and for the further sum of two thousand dollars damages and for costs of this action; and if you fail to appear and plead, answer or demur, as herein required, judgment by default will be entered against you, and the plaintiff will apply to the court for the relief demanded in the complaint herein.

Witness: The Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 23rd day of July in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the 109th.

[SEAL.]

L. S. B. SAWYER,
Clerk.

By F. D. MONCKTON,
Deputy Clerk.

(Endorsed:) UNITED STATES MARSHAL'S OFFICE,
District of California.

I hereby certify that I received the within writ on the 24 day of July, 1884, and personally served the same on the 29th day of July, 1884, by delivering to and leaving with Moses Mock, said defendant named therein,

personally, at the county of Fresno, in said district, a certified copy thereof, together with a copy of the bill of complaint certified to by L. S. B. Sawyer, clerk U. S. cer. court, attached thereto.

M. M. DREW,
U. S. Marshal.
By T. D. DUNLAP,
Deputy.

San Francisco, Aug. 1st, 1884.

Filed August 1, 1884. L. S. B. Sawyer, clerk. By F. D. Monckton, deputy clerk.

4 In the United States circuit court, ninth circuit, district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MOSES MOCK, DEFENDANT. } No. 3414.

Demurrer.

Now comes the above named defendant and demurs to the complaint herein on the ground that the same does not state facts sufficient to constitute a cause of action.

Wherefore defendant prays judgment for costs of suit.

S. J. HINDS,
Attorney for Defendant.

I certify that the above demurrer is well founded in point of law.

S. J. HINDS,
Attorney for Defendant.

(Endorsed:) Service of copy of the within demurrer acknowledged Aug. 31st, 1885. S. G. Hilborn, U. S. attorney. Filed August 31, 1885. L. S. B. Sawyer, clerk.

5 At a stated term, to wit, the November term, A. D. 1885, of the circuit court of the United States of America of the ninth judicial circuit, in and for the district of California, held at the court room in the city and county of San Francisco on Monday, the 4th day of January, in the year of our Lord one thousand eight hundred and eighty-six.

Present, the honorable George M. Sabin, U. S. district judge of Nevada.

THE UNITED STATES OF AMERICA
vs.
MOSES MOCK. } No. 3414.

Certified copy of order, &c.

By consent of the respective counsel it is ordered that the demurrer herein be, and the same hereby is, overruled, and that the defendant have to and including the 5th instant to answer herein.

I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 20th day of April, A. D. 1888.

[SEAL.]

L. S. B. SAWYER,
Clerk.
By F. D. MONCKTON,
Deputy Clerk.

In the United States circuit court, ninth circuit district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MOSES MOCK, DEFENDANT.

Answer.

Comes now the defendant herein and answering the complaint herein denies each and every allegation in the complaint contained.

Wherefore defendant prays judgment for his costs.

S. J. HINDS,
Attorney for Defendant.

6 (Endorsed:) Service of the within answer and receipt of a copy thereof admitted this 5th day of January, 1886. S. G. Hilborn, U. S. atty. Filed Jan. 5, 1886. L. S. B. Sawyer, clerk.

U. S. circuit court, northern district of California.

THE UNITED STATES OF AMERICA
vs.
MOSES MOCK. No. 3414.

Verdict.

We the jury find in favor of the defendant.

WM. B. SWAIN,
Foreman.

(Endorsed:) Filed April 20, 1888. L. S. B. Sawyer, clerk.

In the circuit court of the United States, ninth judicial circuit, northern district of California.

THE UNITED STATES OF AMERICA
vs.
MOSES MOCK. No. 3414.

Certified copy of judgment.

This cause having come on regularly for trial on the 20th day of April, 1888, being a day in the February, 1888, term of said court, before the court and a jury of twelve men duly impaneled by the clerk of said court,

Jackson Hatch, esq., assistant United States attorney, appearing on behalf of the United States, and S. J. Hinds and W. H. Cook, esqs., appearing on behalf of the defendant, and evidence on behalf of the plaintiff
7 having been introduced, and the court having, upon motion of counsel for the defendant, instructed the jury to render a verdict in favor of the defendant, and the jury having subsequently rendered the following verdict: "We the jury find in favor of the defendant," and the court having ordered that judgment be entered herein in accordance with said verdict:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the court that the United States of America, plaintiff, take nothing by this action, and that the defendant go hereof without day.

Judgment entered April 20th, 1888.

L. S. B. SAWYER, *Clerk.*

I hereby certify that the foregoing is a full, true and correct copy of an original judgment entered in the above entitled cause.

Attest my hand and the seal of said circuit court this 20th day of April, A. D. 1888.

[SEAL.] L. S. B. SAWYER, *Clerk.*

(Endorsed:) Filed April 20th, 1888. L. S. B. Sawyer, clerk.

In the circuit court of the United States, ninth judicial circuit, in and for the northern district of California.

THE UNITED STATES OF AMERICA
vs.
MOSES MOCK. } No. 3414.

Clerk's certificate.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the ninth judicial circuit, northern district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the above entitled action.

8 Attest my hand the seal of said circuit court this 20th day of April, 1888.

[SEAL.] L. S. B. SAWYER,
Clerk.
By F. D. MONCKTON,
Deputy Clerk.

(Endorsed:) Judgment roll. Filed April 20th, 1888. L. S. B. Sawyer, clerk. By F. D. Monckton, deputy clerk.

9 In the circuit court of the United States in and for the ninth circuit for the northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
v.
MOSES MOCK, DEFENDANT.

Engrossed bill of exceptions.

Be it remembered: This cause came on for trial before a jury on April, 20th, 1888. Both parties appeared with counsel. The following proceedings were had:

It was admitted by both parties that the land described in the complaint was not surveyed by the United States Government until 1881, and that until that time it was public land of the United States.

Jonathan Achey was called, and after being sworn, testified as follows:

I have resided in Fresno County, California, on Pine Ridge, from 1873 up to the present time, and on section 9, township 10 south, range 24 east, and on the southeast quarter thereof about four months. In 1876–7–8 I lived on northeast quarter of the same section. I know of defendant operating a sawmill in that section of the country in 1877–8, and on section 9.

Counsel for defendant objected here to this testimony because it was at variance between the complaint and the proof, and they moved to strike it out—the witness' answer as to any acts done by the defendant in 1878, as not being charged in the complaint, which alleged the cutting to have been done between May first, 1873, and December thirty-first, 1874.

Here the witness was temporarily withdrawn by plaintiffs.

Defendant was then called by plaintiffs as a witness, and after being sworn, testified as follows:

In 1873 I was not in this State. In the summer of 1874 I was at Pine Ridge, in Fresno County, in this State. Was not in business there, nor in 1873. In 1874 I was running a sawmill there for Mr. Humphries. I had no interest up there at all that year. I had no interest
10 in the business there—in that section of the country—at all until 1876. I did not commence business there until 1876.

The witness, Achey, was here recalled by plaintiffs, and testified as follows:

I know, while I lived on Pine Ridge, of defendant operating a sawmill, on section 9, of that township. I do not know of his operating a sawmill there in 1873–4.

Mr. Hatch, asst. U. S. attorney. Do you know whether or not he operated a sawmill on the same section and on the land described in the complaint after the years 1873 and 1874?

Objected to by defendant's counsel as irrelevant and immaterial and incompetent, and as not tending to sustain any issue in the complaint.

Objection sustained by the court.

Counsel for plaintiffs duly reserved an exception to the ruling.

Here, by permission of the court, counsel for plaintiffs made the following offer of proof:

The United States offer at this point to prove by witnesses in attendance that during the years 1877 and 1878 defendant entered upon the

lands described in the complaint in this action, not as an agriculturist or as a miner, but solely for the purpose of cutting the timber growing and standing thereon, of the quality and kind referred to in the complaint, and of manufacturing the same into lumber for the sole and exclusive purpose of sale to the public generally; and that, with such design and purpose, defendant, having entered upon the land at that time, to wit, in the years 1877–8, did cut timber of the kind and quality referred to in the complaint, and did manufacture the same into lumber, and did thereafter expose the same for sale, and did sell the same to the public generally; and that the market value of the lumber, at the time it was manufactured for sale and sold, was 9 dollars per 1,000 feet, board measure, and that the market value of the timber before it was manufactured into lumber by defendant, and while it was standing in the forest, was 2 dollars per 1,000 feet; and that the amount of timber so cut by the defendant was 500 trees; and that the amount of lumber so manufactured by the defendant therefrom was one and a half milllion feet, board measure.

11 To this offer the counsel for the defendant objected on the ground that the evidence was immaterial, irrelevant, and incompetent, under the ruling of the court, and also that it was alleged in the complaint that the trespass was committed between the month of May, 1873, and December, 1874, and that it was irrelevant and incompetent as to any issue made by the pleadings as they stood, and as to 1877 and 1878 the proof was irrelevant and incompetent.

The objection was sustained by the court, and the counsel for the plaintiffs reserved an exception to the ruling.

Counsel for the plaintiffs then asked for leave to so amend the complaint as that it would conform to the facts by embracing the period between the first day of May, 1873, to and including the years 1877 and 1878.

To this request the counsel for the defendant objected on the ground that it was an appeal to the discretion of the court, and that to do so would work an injustice to the defendant, and would be setting up a different cause of action, and one not germane to the complaint in the case.

Counsel for plaintiffs then stated that if counsel for defendant would want a continuance in the event that leave to amend was granted, he was willing for them to have it, so as to enable them to prepare such a defence as they might desire.

The court then ruled that so far as the years 1873 and 1874 was concerned, the defendant was entitled to a verdict, and the motion was denied, the court stating that the Government was free to commence a new suit for the alleged trespasses committed in 1877 and 1878.

Counsel for the plaintiffs duly excepted to the ruling of the court.

The court thereupon directed the jury to render a verdict in favor of the defendant, to which the counsel for the plaintiffs duly excepted, and the jury then rendered and declared a verdict in favor of the defendant, after which the jury were discharged, and judgment was thereupon entered in favor of the defendant on the ground of the failure of the evidence on the part of plaintiffs.

At the opening of the case, when the attorney for the plaintiffs stated the case to the jury, he stated to them that he would not rely upon the trespass as of the time stated in the complaint, but that the evidence

12 would show that it was during the years 1877 and 1878.

I hereby certify that the foregoing is a true bill of exceptions taken by the plaintiffs at the trial of the action therein named, and that it is hereby allowed and settled, and that it was duly presented.

Dated this May 17th, 1888.

GEO. M. SABIN, *Judge.*

(Endorsed:) Filed May 18, 1888. L. S. B. Sawyer, clerk. By F. D. Monckton, deputy clerk.

13 In the circuit court of the United States, ninth judicial circuit, in and for the northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF and plaintiff in error,
vs.
MOSES MOCK, DEFENDANT AND DEFENDANT IN error.

I, L. S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit, in and for the northern district of California, do hereby certify that the foregoing twelve written or printed pages numbered from 1 to 12, inclusive, are a full, true, and correct copy of the record and all proceedings in the above entitled action, and that the same together constitute the return to the annexed writ of error.

Attest my hand and the seal of said circuit court this 16th day of September, A. D. 1889.

[SEAL.] L. S. B. SAWYER, *Clerk.*

14 UNITED STATES OF AMERICA, ss:

The President of the United States of America, to the judges of the circuit court of the United States of the ninth judicial circuit in and for the northern district of California, greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between the United States of America, plaintiffs and plaintiffs in error, and Moses Mock, defendant and defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs and plaintiffs in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the first Monday of December next, in the said Supreme Court, to be there and then held, that, the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 19th day of October, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

L. S. B. SAWYER,
Clerk of the Circuit Court of the United States for the Northern District of California.

The above writ of error is hereby allowed.

LORENZO SAWYER,
U. S. Circuit Judge, 9th Judicial Circuit.

15 *The answer of the judges of the circuit court of the United States for the northern district of California:*

The record and all proceedings of the plaint whereof mention is within made with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States of America within mentioned at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court.

L. S. B. SAWYER,
Clerk.

(Indorsed:) No. 3414. United States Supreme Court. The United States of America, plffs. & plffs. in error *vs.* Moses Mock, deft. & deft. in error. Writ of error filed October 19, 1888. L. S. B. Sawyer, clerk.

16 UNITED STATES OF AMERICA, ss.

To Moses Mock, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 3d day of December, A. D. 1888, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, wherein the United States of America are plaintiffs and plaintiffs in error and you are defendant and defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Lorenzo Sawyer, circuit judge of the United States of America for the northern district of California, this 19th day of October, A. D. 1888, and of the Independence of the United States the one hundred and thirteenth.

LORENZO SAWYER,
U. S. Circuit Judge, Northern District of California.

17 (Indorsed:) No. 3414. In the Supreme Court of the United States. The United States of America, plffs. and plffs. in error, vs.

Moses Mock, deft. and deft. in error. Citation. Service of a copy of the within citation is hereby acknowledged this 19th October, 1888. S. J. Hinds and Wm. Hoff Cook, attys. for deft. in error. Filed October 19, 1888. L. S. B. Sawyer, clerk.

(Indorsement on cover:) No. 234. The United States, plaintiff in error, vs. Moses Mock. 13844. N. California C. C. U. S. Filed October 21, 1889.

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Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, PLAINTIFF in error,
vs.
JOHN W. HUMPHRIES AND MOSES Mock.
} No. 235.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, PLAINTIFF in error,
vs.
JOHN W. HUMPHRIES AND MOSES Mock.
} No. 235.

STATEMENT.

In this case suit was commenced July 23, 1884, by the filing of a complaint in the circuit court, which sets forth that on May 1, 1866, and thereafter the plaintiff was and still is, and theretofore had been, the owner of the east half of the southeast quarter, section 9, southwest quarter and the east half of the southeast quarter section 10, northwest quarter and west half of the northeast quarter of section 15, township 10 south, range 24 east, Mount Diablo meridian, together with all the trees growing and being thereon.

And that the defendants, on May 1, 1866, and at divers times between that day and December 31, 1874, wrongfully and unlawfully, and without the consent of the

plaintiff, cut, and caused to be cut, on said land, the property of the United States, 3,000 pine trees, and manufactured the same into lumber, producing 9,000,000 feet of lumber, of the value of $90,000.

That said defendants wrongfully, and without the consent of the plaintiff, took said lumber from the possession of said plaintiff, and still unlawfully withhold said goods and chattels from the possession of the plaintiff, to plaintiff's damage $90,000. (Rec., p. 1.)

The answer (p. 4) is a general denial. The cause was tried April 24, 1888, before Judge Sabin and a jury, and after hearing the evidence and the instructions of the court, the jury found in favor of the defendants, and judgment was entered accordingly (p. 5).

The questions arising in the case are on the grounds:

(1) That the court admitted, under the plaintiff's objections, incompetent testimony.

(2) That the court improperly refused to instruct the jury as requested.

(3) That the verdict was not justified by the evidence received in the case.

ASSIGNMENT OF ERRORS.

1. The court erred in receiving, under plaintiffs objection, imcompetent evidence given by witness Humphries, who was one of the defendants, and was sworn as a witness in plaintiff's behalf.

> Question (by defendants' counsel). With your operating there and the expense of the mill and the roads, did you make anything out of it.

(Objected to by plaintiffs as irrelevant, immaterial, and incompetent, and as not tending to sustain the issues in the case, and as not being cross-examination. Objection overruled by the court, and exception to the ruling taken by the plaintiffs) (p. 11.)

Answer of the witness. No, we never made anything.

2. The court erred in receiving against plaintiffs' objection the following evidence given by witness Moses Mock, who was one of the defendants and was called as a witness for the plaintiffs, as follows:

Cross-examination:

Question by the counsel for the defendant. I will ask you the direct question so as not to conceal anything: Did you and Mr. Humphries make anything by your operations? (Objected to by plaintiffs as irrelevant, immaterial, and incompetent. Objection overruled, and exception to the ruling by plaintiffs).

Answer. If I was to come out with $40 a month I would be better satisfied than I am now.

Witness (resuming). One of our roads cost us something over $3,000. I do not think we made anything (p. 12).

3. The court erred in refusing to instruct the jury as follows:

If a person enters upon public lands of the United States and there cuts, or causes or procures to be cut, any timber standing or growing thereon, without authority of law, and not for the purpose of agriculture or mining, and with the sole purpose and intent of manufacturing said timber, when cut, into lumber and then selling said lumber to the public, and, in pursuance of such intent, does manufacture

such timber into lumber and does offer it for sale, and does sell it to the public, the United States are entitled to maintain against such person an action for the value of the timber so cut.

4. The court erred in refusing to instruct the jury as follows:

> In order to render a trespass upon the public lands of the United States a willful trespass in the meaning of the law it is not essential that the act be the result of or accompanied with any artifice, or trick, or device, or secret fraud, nor that it be malicious or wanton. It is a willful trespass if it is committed knowingly and intentionally.

5. The court erred in refusing to instruct the jury, as requested by plaintiff, as follows:

> One who enters upon public lands of the United States, knowing that it is public land, for the sole purpose of cutting timber and manufacturing the same into lumber for sale to the public, and who does, with such intent, cut timber thereon and manufacture it into lumber, without being authorized by the United States to do so, is a willful trespasser on such land, and he can not defend an action brought against him for the value of such lumber upon the ground that the land at the time of the cutttng was not for sale by the United States, nor upon the ground that the community in which the timber was sold was benefited thereby, nor upon the ground that the United States did for many years tacitly permit timber to be cut upon their public land by the early settlers or pioneers for their own use, nor can the history of the attitude of the United States towards the unlicensed cutting of timber on their public land by early settlers or pioneers, nor can such history immediately contemporaneous with the trespass involved

in the particular case be made available to the trespasser in such action. Nor do such circumstances, if they appear in any such action, afford the trespasser any ground of relief in the way of mitigation of damages.

6. The court erred in entering judgment upon the verdict of the jury because it appears that the evidence given in the case fails to justify the verdict. The defendants were shown to have owned and operated the sawmill located on the Rose Baring lot, described in the complaint; and to have built the mill there with the intention of manufacturing timber taken from the Government lands into lumber, knowing such lands to be Government lands, and intending to sell the lumber so made. It also appears that they cut a large number of trees upon the land described in the complaint and manufactured the same into lumber at said mill and sold the same to purchasers, they then and there knowing that the lumber belonged to the United States; the verdict therefore should have been for the plaintiffs for some amount, and a judgment rendered upon a verdict found is error.

ARGUMENT.

I.

THE EVIDENCE SHOWS THAT THE VERDICT OF THE JURY WAS UNAUTHORIZED.

It appears that the sawmill by means of which the timber taken from the Government lands was cut into lumber was located on the southeast quarter of section 9. The lands described in the complaint from which it is

charged the defendants cut and removed the timber are situated partly to the north but more to the east and southeast of said mill (p. 10).

The witness Humphries says that he is one of the defendants; that he was at Pine Ridge from 1866 to 1873–'74, in business with Mr. Mock; that they operated a mill there from 1867 to 1872 or 1873, and that the mill was built by Mock and himself in 1867, and that in 1872 they moved the mill east to the Littlefield claim, which was on section 10.

He states that this was the first sawmill in that part of the country. He says, "We built this mill there to saw lumber for the purposes of sale." He states that the land there was understood to be unsurveyed. He says they were in active business there from 1867 to 1872 or 1873, running this mill part of every season and cutting from 7,000 to 8,000 feet of lumber, and some of the time from 8,000 or 9,000 feet per day. He says that Mock and himself generally directed the cutting of the timber; that some was cut on the Rose Baring claim and some of it east of where the mill was. He says he thinks the largest part of the timber was brought to the mill from the south. He continues:

> Mr. Mock and I paid the men for cutting it. We sold the lumber to other people. During that time we generally sold it at $9 and $10 a thousand feet. We sold generally all the lumber that was manufactured. I think that we manufactured during the whole time we were operating this mill there as much as 3,000,000 feet of lumber, and sold it. I think some of the timber came from the east a short distance (p. 11).

The witness Mock says (p. 12) that the defendants operated the mill from 1867 to 1872, and manufactured timber into lumber there:

> We went there for that purpose. We intended to manufacture the timber into lumber for the purposes of sale. And we did sell it after we manufactured it. They got the timber that we made into lumber at that mill within a radius around the mill of about a quarter of a mile. The mill was on the Rose Baring claim. I think that the most of the timber that we got came from south of where the mill stood. Some from the east. * * * We sold all the lumber that we made. We knew that was Government land. We sold the lumber for different prices, all we could get for it. * * * We went there for the purpose of making lumber and money. We did not go there for the fun of it.

The evidence of the other witnesses supplements and extends that given by these two witnesses.

It will be noticed that the defendants unhesitatingly admit that they took, converted, and sold the timber and lumber belonging to the Government, and that they knew that the same was Government property. It will be noted that both witnesses put a valuation upon the pine trees as they stood in the forest. It is a necessary conclusion that the jury should have given a verdict in favor of the United States for some amount, after allowing the evidence of the defendants all of the weight it can be entitled to.

Therefore, it is respectfully submitted that the verdict was not justified, and that the judgment rendered is without legal foundation.

II.

THE COURT ERRED IN RECEIVING INCOMPETENT TESTIMONY UNDER PLAINTIFF'S OBJECTION.

The following appears on page 11, to wit:

> Question (by defendant's counsel). With your operating there and the expense of the mill and the roads, did you make anything out of it?
>
> (Objected to by plaintiffs as irrelevant, immaterial, and incompetent, and as not tending to sustain the issues in the case, and as not being cross-examination. Objection overruled by the court, and exception to the ruling taken by the plaintiff.)
>
> Answer of the witness. No; we never made anything.

The following appears on page 12, to wit:

> Cross-examination:
>
> Question (by the counsel for the defendant). I will ask you the direct question so as not to conceal anything: Did you and Mr. Humphries make anything by your operations?
>
> (Objected to by plaintiff as irrelevant, immaterial, and incompetent. Objection overruled, and exception to the ruling by plaintiff.)
>
> Answer. If I was to come out with $40 a month I would be better satisfied than I am now.
>
> Witness (resuming). One of our roads cost us something over $3,000. I do not think we made anything.

These witnesses were called and sworn by the Government, and were the defendants in the case.

Defendant's counsel seized the opportunity to place the foregoing testimony before the jury.

It is manifest that the jury had the right to infer from this testimony that if the defendants made no money by the trespasses and conversion complained of, they were to be excused for having committed the trespass.

It is manifest that the jury might have found from this evidence that their failure to make a profit in the transaction was a sufficient defense of their acts.

III.

THE COURT ERRED IN ITS REFUSALS TO INSTRUCT THE JURY AS REQUESTED.

Counsel for the United States submitted several independent requests to the court to instruct the jury as in such requests respectively set forth. These requests appear on pages 13–15 of the record.

It is stated on page 15, following the requests, as follows, that—

> Each of said proposed instructions to the jury, so requested by the attorney for the plaintiffs, was by the court refused.

A.

The first of said instructions asked was as follows (p. 13):

> *No.* 1.—If a person enters upon public lands of the United States and there cuts, or causes or procures to be cut, any timber standing or growing thereon, without authority of law and not for the purpose of agriculture or mining, and with the sole purpose and intent of manufacturing said timber, when cut, into lumber and then selling said lumber

> to the public, and, in pursuance of such intent, does manufacture such timber into lumber and does offer it for sale, and does sell it to the public, the United States are entitled to maintain against such person an action for the value of the timber so cut.

As the foregoing request is strictly in accordance with the law, and was applicable under the issues and the testimony, it is submitted that the refusal of the court to instruct as so requested was error.

B.

The court was also requested to instruct the jury as follows (p. 15):

> *No.* 10.—In order to render a trespass upon the public lands of the United States a willful trespass in the meaning of the law it is not essential that the act be the result of or accompanied with any artifice or trick, or device, or secret fraud, nor that it be malicious or wanton. It is a willful trespass if it is committed knowingly and intentionally.

The court refused to so instruct.

It is submitted that this request was made in accordance with the law, and was proper in the premises, and that the refusal constitutes an error, on account of which the plaintiff in error has the right to make legal complaint.

C.

Counsel for the United States also requested the court to instruct the jury as follows (p. 15):

> *No.* 8.—One who enters upon public lands of the United States, knowing that it is public land, for the

> sole purpose of cutting timber and manufacturing the same into lumber for sale to the public, and who does, with such intent, cut timber thereon and manufacture it into lumber, without being authorized by the United States to do so, is a willful trespasser on such land, and he can not defend an action brought against him for the value of such lumber upon the ground that the land at the time of the cutting was not for sale by the United States, nor upon the ground that the community in which the timber was sold was benefited thereby, nor upon the ground that the United States did for many years tacitly permit timber to be cut upon their public land by the early settlers or pioneers for their own use, nor can the history of the attitude of the United States towards the unlicensed cutting of timber on their public lands by early settlers or pioneers, nor can such history immediately contemporaneous with the trespass involved in the particular case be made available to the trespasser in such action, nor do such circumstances, if they appear in any such action, afford the trespasser any ground of relief in the way of mitigation of damages.

The court refused to instruct the jury as thus requested, but, on the contrary, did instruct the jury as follows (p. 17, last half):

> It is a part of the history of the country, and may be taken notice of by all, that during many years—fifty or sixty—the Government has always been kind and considerate to the pioneers and early settlers. It has permitted them to a certain extent to cut from the public land such timber as might be required for their needs and necessities. I have had occasion to explain this in connection with these suits to other juries. I think that the first act passed by Congress

was in 1833, making it penal to cut certain kinds of timber growing upon public land which had been reserved for Government uses. The settlement of the country went on continuously, however, thereafter as it had before. It is a matter of common knowledge that in the early settlement of the country the early settler had occasion to and did use for his necessities timber growing upon the public domain. That was especially true where timber was scarce. It ran on in that way until 1878, I think, when the next act of Congress was passed making it unlawful for parties to go upon the public domain and cut timber for sale or export. You have a right to consider all of these circumstances. As I observed, it is a matter of common knowledge. The mode and manner in which the country was settled up and the mode and manner in which the people utilized the timber on these public lands for their domestic use to supply their needs was known.

You have a right to consider all of the circumstances of the case—these facts, in considering and determining whether, twenty-two years ago, the act of these defendants in going on the public lands in Fresno County and establishing their mill was a willful act within the law.

In addition to the request to instruct (fol. 20), and the refusal of the court (fol. 23), the following appears as the conclusion of the proceedings in the case (fol. 27):

Counsel for the plaintiffs thereupon, in due and proper time and manner, excepted to the action of the court in refusing and omitting to give and read to the jury the said written instructions numbered from 1 to 10, inclusive, so requested, and in refusing and omitting to give and read each and every one of said written instructions to said jury.

> Thereupon the jury retired in proper manner, and thereafter duly came into court and declared in proper manner a verdict in favor of the defendants and against the plaintiffs.

It is respectfully submitted that the court below instructed the jury, as above shown, in effect that the jury had the right to find that in Fresno County, California, at the time defendants' mill was running, lumbermen had the right to go upon the Government lands at will and cut and remove timber and lumber therefrom, and manufacture the trees into boards, as a business, and sell the boards to settlers and ranchmen in the valleys without becoming liable to respond in damages, and without being liable by law to pay to the Government the value of the trees or the lumber.

This is manifest error.

It is urged on behalf of the plaintiff in error that the judgment entered in the court below should be reversed.

A. X. PARKER,
Assistant Attorney-General.

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